92-1080

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM STEPHENSON,

Petitioner,

v.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure should be granted when a subsequent Supreme Court decision makes it clear that the lower court erred in entering summary judgment initially and the aggrieved person has exhausted his appellate rights prior to the subsequent decision by the Supreme Court.

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OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is an unpublished opinion and is included in the Appendix starting at Appendix p. 1. The decision of the United States District Court for the District of Maryland is unreported and is included in the Appendix starting at Appendix p. 8.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on September 28, 1992. Jurisdiction to review this judgment by writ of certiorari is conferred on the Supreme Court pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 26, 1986, William Stephenson ("Stephenson") was injured in the course

of his employment with McLean Contracting Company ("McLean") on a bridge construction project on the Choptank River. He was regularly assigned to work on the Annapolis, a crane barge that was being used to construct the support structure for the bridge columns traversing the Choptank River. On the day of his injury, Stephenson had been temporarily assigned to another crane barge owned by the Defendant, the Newport News and was assigned to work inside a cofferdam, a boxlike structure constructed to keep water from the river out of the work area. Stephenson sustained serious and permanent injuries when he slipped on a beam inside the cofferdam and fell to the concrete floor of the cofferdam.

Stephenson filed suit in the U.S. District Court for the District of

Maryland under the Jones Act. McLean moved for summary judgment arguing that Stephenson was not a seaman for purposes of the Jones Act. Initially, the motion was denied and the case proceeded to trial. After hearing two days of testimony, the District Court reversed its prior ruling and granted Defendant's summary judgment motion. In its written opinion, the court relied on Whittington v. Sewer Construction Co., 541 F.2d 427 (4th Cir. 1976). In Whittington, the Court of Appeals for the Fourth Circuit set out the following three-prong test for determining whether a worker is a "seaman" for coverage under the Jones Act: (1) whether the worker is "more or less permanently attached to a vessel or fleet"; (2) whether the vessel or fleet is "in navigation"; and (3) whether the

worker's "duties serve naturally and primarily as an aid to navigation in the broadest sense" (emphasis added).

The District Court assumed that Stephenson satisfied the first and second prongs of the Whittington test, but the court ruled that the third prong was not satisfied because Stephenson's duties considered in the aggregate, did not primarily serve as an aid to navigation. The court stated that Stephenson was not primarily engaged in moving the Annapolis or otherwise contributing to a transportation function of the barge.

Aggrieved with the decision of the District Court, Stephenson appealed to the Court of Appeals for the Fourth Circuit. In a brief per curiam opinion decided December 23, 1988, the Fourth Circuit affirmed. Stephenson v. McLean Contracting

Co., 863 F.2d 340 (4th Cir. 1988). The Fourth Circuit agreed with the District Court that Stephenson did not satisfy the test set forth in Whittington, stating: "[W]e think it is clear that the duties of Stephenson did not 'serve naturally and primarily as an aid to navigation in the broadest sense.'" Stephenson also petitioned the Fourth Circuit for a rehearing, which was denied on February 2, 1989.

Believing that the lower courts improperly interpreted the Jones Act as to require a worker to be involved in the transportation-function of a vessel, Stephenson petitioned the Supreme Court for certiorari. In his petition for certiorari, Stephenson argued that one need not be involved in the transportation function of the vessel to be covered under

the Jones Act and that the District Court improperly injected this requirement in Stephenson. Stephenson also argued the conflict that existed among the federal circuits. The Supreme Court denied the petition on May 22, 1989, although Justice White would have granted certiorari. Stephenson v. McLean Contracting Co., 109 S.Ct. 2110 (1989).

On February 19, 1991, the Supreme Court in McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807 (1991), addressed the criteria for determining seaman status under the Jones Act, and resolved a conflict that had developed in the lower courts. Certiorari in McDermott was filed on March 20, 1990, less than nine months after Stephenson's petition for certiorari was denied. In its opinion, the Supreme Court unanimously held that one need not

aid in the navigation of a vessel in order to qualify as a seaman under the Act. After an exhaustive analysis of the history and legislative intent of the Jones Act, the Court expressly rejected the concept that a worker has to perform transportation-related functions to be covered under the Jones Act. The Supreme Court traced the history of the Jones Act and determined that the Act had never required that a seaman aid in navigation. The Court held that it was only necessary that an employee be on-board a vessel in furtherance of its purpose.

On April 30, 1991, Stephenson filed a motion pursuant to Fed. R. Civ. P. 60(b), requesting the District Court reopen the judgment in light of the McDermott decision. The lower court denied the

motion[1], and the Court of Appeals for the Fourth Circuit affirmed.

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[1] It is interesting to note the lower court's comments in another admiralty case handled by petitioner's attorneys, Yoash v. McLean Contracting Company, Civil No. JFM-88-2797 (D. Md.), which this Court granted certiorari and remanded in light of McDermott. 111 S. Ct. 1068 (1991). In Yoash, the lower court indicated the view that McDermott was misguided if this Court "intended to extend Jones Act remedies to persons who are essentially construction workers, exposed to no greater hazards than are their counterparts working on the adjacent land...." Memorandum dated November 14, 1991 which is included in the Appendix starting at page 25. The lower court also indicated its reluctance to conclude whether a crane barge is a "vessel in navigation." It is submitted that these comments demonstrate the lower court's proclivity towards a limited interpretation of the Jones Act. In exercising discretion whether to re-open a judgment, the lower court would therefore be reluctant to re-open a judgment when the underlying claim is based on the Jones Act.

REASONS FOR GRANTING WRIT

In Polites v. United States, 364 U.S. 426 (1960) the issue of whether a subsequent change in the law would entitle one to relief from judgment under Rule 60(b) was before the Supreme Court. The Court, however, did not address the issue because the Court determined that the decision relied on by the petitioner did not alter the law controlling the petitioner's case. In the present case, the reasons are very compelling to grant certiorari because the subsequent McDermott decision squarely addressed the point of law that was relied upon in granting summary judgment against Stephenson. Moreover, the Supreme Court in McDermott indicated what the scope of the Jones Act had been from its enactment. Thus, more is involved in the present case

than just a mere change in the law because the Supreme Court in McDermott stated what the law had always been.

The case of United States v. Mandel, 672 F. Supp. 864 (D. Md. 1987), aff'd, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989) is instructive on this significant nuance. Judge Smalkin, in light of McNally v. United States, 107 S.Ct. 2875 (1987), set aside the conviction for mail fraud and racketeering of former Governor Marvin Mandel ten years after he was convicted and eight years after the Supreme Court denied certiorari. Although a criminal case in which the writ of coram nobis was used, the decision is important because the case did not involve a subsequent change in the law, but rather a later clarification of what the law had always been. This is precisely the

situation with Stephenson and the subsequent McDermott decision. The District Court in Mandel noted: "[b]ecause the Supreme Court was interpreting the statute in light of its legislative history and intent, obviously static properties of the statute, the reach of the statute has logically been as narrow as McNally's interpretation since the day of its enactment." Mandel, 672 F. Supp. at 873.

Even if it is considered that McDermott was a subsequent change in the law, the lower courts are in conflict whether a subsequent change is a sufficient basis for granting relief under Rule 60(b). See generally, Comment, Federal Rule of Civil Procedure 60(b): Standards for Relief from Judgment Due to Changes in Law, 43 U.Chi.L.Rev. 646 (1976).

In Tsakonites v. Transpacific Carriers Corp., 332 F. Supp. 722 (S.D.N.Y. 1970), a case factually similar to that of Stephenson, the U.S. District Court for the Southern District of New York addressed a Rule 60(b) motion in a Jones Act case. The plaintiff in Tsakonites brought suit under the Jones Act, and the District Court rendered a decision that the plaintiff's contacts with the United States were insufficient to justify the application of the Jones Act. Plaintiff appealed the decision to the Court of Appeals, but the decision was affirmed. On a petition for rehearing, the Court of Appeals en banc decided against the plaintiff. Plaintiff then filed a petition for a writ of certiorari in the Supreme Court. The petition was denied on April 17, 1967. On June 8, 1970 the

Supreme Court decided Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970), which overruled the rationale relied upon by the District Court in dismissing Tsakonites' case. In light of the Rhoditis decision, Tsakonites moved the District Court under Rule 60(b) that the previous dismissal of his suit be vacated. The District Court vacated the original judgment, stating: "I believe it to be in the interest of justice in the exceptional circumstances of this case to grant Tsakonites his day in court now that the Supreme Court appears to have overruled the previous decisions against him." Tsakonites, 322 F. Supp. at 725.

The Third and Tenth Circuits would permit a 60(b) motion when there is a subsequent change of the law. In Wilson v. Fenton, 684 F.2d 249, 251 (3rd Cir. 1982)

the court of appeals noted that "a decision of the Supreme Court of the United States or a Court of Appeals may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion." In Wilson, however, the court determined that the Supreme Court case relied upon by petitioner was inapplicable to his case. The Court of Appeals for the Tenth Circuit in Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989) was more definitive, stating that "a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)."

The Court of Appeals for the Eight Circuit in Cox v. Wyrick, 873 F.2d 200, 201 (8th Cir. 1989) indicated that a "change in the law having retroactive application may, in appropriate

circumstances, provide the basis for granting relief under Rule 60(b)." (emphasis added).

The Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have indicated that change in decisional law is not enough to warrant relief under Rule 60(b). Travelers Indem. Co., v. Sarkisian, 794 F.2d 754 (2nd Cir. 1986); Nunnery v. Barber, 23 Fed.R.Serv.2d 232 (4th Cir. 1977); Bailey v. Ryan Stevedoring Co., Inc. 894 F.2d 157, 160 (5th Cir. 1990), cert. denied, 111 S.Ct. 89. ("A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment."); Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952); McKnight v. United States Steel Corp., 726 F.2d 333 (7th Cir. 1984);

Carter v. Romines, 593 F.2d 823 (8th Cir. 1979); Tomlin v. McDaniel, 865 F.2d 209 (9th Cir. 1989). Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987), cert. denied, 483 U.S. 1010 (1987)(Something more than a "mere" change in the law is necessary to provide the grounds for Rule 60(b)(6) relief. The court, however, went on to find that there were significant factors to warrant relief under 60(b)(6).

Justice in an individual case must prevail over finality of judgments. Stephenson sustained permanent and serious injuries and was precluded from his day in court merely because his case pre-dated McDermott and because of an improper interpretation of the Jones Act by the district court and the Court of Appeals

for the Fourth Circuit.[2] Stephenson has not been dilatory in pursuing his claim. He did everything that was in his power to obtain a proper result before the judgment became final. He fully exhausted his appeal rights and pursued his claim all the way to the Supreme Court.

Stephenson simply has not had a fair opportunity to present his claim, and will always be precluded from doing so unless this Court grants certiorari to address the important issues presented. Stephenson merely asks for the opportunity to present his case and have it decided under the

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[2] In light of McDermott, the Supreme Court granted certiorari and remanded another Jones Act case of Stephenson involving a prior shoulder injury. Stephenson v. McLean Contracting Co., 111 S.Ct. 1615 (1991). Thus, his shoulder injury case was allowed to proceed, while his more serious injury involved in this petition has not. This inconsistency highlights the extraordinary circumstances presented in Stephenson's case.

proper standard for determining seaman status under the Jones Act. The Supreme Court in McDermott has affirmatively removed the hurdle incorrectly applied to Stephenson by the lower courts.

In that there is a conflict as to whether a change in the law constitutes the extraordinary circumstances justifying relief under Rule 60(b)(6), guidance is need from the Supreme Court to resolve the inconsistent results in the lower courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be granted.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

N. 91-2637

WILLIAM STEPHENSON,

Plaintiff-Appellant,

v.

McLEAN CONTRACTING COMPANY, INC.,

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-87-587-JFM).

Argued: May 6, 1992
Decided: September 28, 1992

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed by unpublished opinion.

OPINION

PER CURIAM:

William Stephenson appeals the district court's denial of his FED. R. Civ. P. 60(b) motion to reopen a prior judgment in this case. Finding no abuse of discretion, we affirm the judgment of the district court.

Stephenson, an employee of McLean Contracting Company, was injured while working on a bridge construction project on the Choptank River. The district court determined that Stephenson had no claim under either the Jones Act, 46 U.S.C. App. § 688(a), or the maritime doctrine of unseaworthiness, and granted summary judgment to McLean. This decision was premised on the finding that, under Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976), Stephenson was not a

"seaman" for purposes of the Jones Act because his duties at the time of injury did not serve naturally and primarily as an aid to navigation in the broadest sense. Stephenson v. McLean Contracting Co. 702 F.Supp. 552, 554 (D. Md. 1988).

We affirmed the district court's decision, agreeing "that the plaintiff failed to present evidence that he was a seaman within the test set forth in Whittington." Stephenson v. McLean Contracting Co., 863 F.2d 340, 341 (4th Cir. 1988), cert. denied, 490 U.S. 1085 (1989). Subsequently, the Supreme Court held, contrary to Whittington, that one need not aid in the navigation of a vessel to qualify as a seaman under the Jones Act. McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807, 816-18 (1991).

Two months after the decision in

McDermott, Stephenson filed his Rule 60(b) motion for relief from the district court's earlier judgment because that decision was at odds with McDermott. The district court found that Stephenson had not demonstrated extraordinary circumstances warranting relief, and denied the motion. It is from that decision that Stephenson appeals.

Stephenson did not premise his motion upon a specific subsection of Rule 60(b). However, we agree with McLean and the district court that the motion is properly construed as brought pursuant to Rule 60(b)(6), which provides relief for "any other reason justifying relief from the operation of the judgment." This is particularly true in light of our conclusion that Nunnery v. Barber, 23 Fed. R. Serv. 2d 232 (4th Cir.), vacated on

other grounds, 25 Fed. R. Serv. 2d 856 (4th Cir. 1977), is persuasive in the subject appeal.

In Nunnery, as in the present case, the issue was "whether Rule 60(b)(6) authorizes relief from a judgment on the ground that the rule of law applied by the court has been subsequently overruled or declared erroneous in another unrelated proceeding." Nunnery v. Barber, 23 Fed. R. Serv. 2d at 233. In 1973, the district court dismissed Nunnery's complaint for failure to state a claim. Nunnery had alleged that she was dismissed from a job for patronage purposes in violation of the First and Fourteenth Amendments. We affirmed the district court's decision. Nunnery v. Barber, 503 F.2d 1349, 1359-60 (4th Cir. 1974), cert. denied, 420 U.S. 1005 (1975).

Subsequently, in Elrod v. Burns, 427 U.S. 347 (1976), the Supreme Court held, contrary to our holding in Nunnery, 503 F.2d 1349, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments. Id. at 373. Nunnery then filed a Rule 60(b) motion in the district court, asking that the court's earlier decision be vacated in light of Elrod.

The district court denied the motion on jurisdictional grounds, and Nunnery applied to this Court for leave to direct the district court to decide her motion. After disposing of the jurisdictional question, we held that because our final judgment in Nunnery preceded Elrod by more than one year and because Elrod contained no indication that the Supreme Court intended its holding to be applied

retroactively, there was no reason to grant relief under Rule 60(b)(6). Nunnery v. Barber, 23 Fed. R. Serv. 2d at 234. Accord: Hall v. Warden, Maryland Penitentiary, 364 F.2d 495 (4th Cir. 1966) (en banc).

In the present case, as in Nunnery, this Court's prior decision preceded the Supreme Court's decision in McDermott by more than one year. Similarly, there is no suggestion in McDermott that the Supreme Court intended its decision to have retroactive effect. We see no difference between the facts of Nunnery and those of Stephenson's case that would justify a different result.

Accordingly, because the district court did not abuse its discretion in denying relief, we affirm the decision of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON	*	
v.	*	
MCLEAN CONTRACTING COMPANY	*	CIVIL NO. JFM-87-587
	*	

****

MEMORANDUM

On March 26, 1986, William E. Stephenson was injured while working for McLean Contracting Company ("McLean") on a bridge construction project on the Choptank River. He thereafter instituted an action in this court, asserting claims under the Jones Act, 46 U.S.C. § 688. I granted a motion for summary judgment filed by McLean on the ground that Stephenson was not a "seaman" within the meaning of the Jones Act. This decision was based upon a finding that Stephenson

did not satisfy the third prong of the test established by Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976), in that his "duties, considered in the aggregate, did not primarily serve as an aid to navigation." Stephenson v. McLean Contracting Co., JFM-87-587, slip op. at 4 (D. Md. Apr. 20, 1988) (emphasis added).

Stephenson filed an appeal. In a per curiam opinion, the Fourth Circuit affirmed on the ground that Stephenson did not "'serve naturally and primarily as an aid to navigation in the broadest sense.'" Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th Cir. 1988) (citations omitted). Stephenson petitioned the Fourth Circuit for a rehearing, which was denied on February 2, 1989. He then petitioned the Supreme Court for a writ of certiorari. That petition was denied on

May 22, 1989. Stephenson v. McLean Contracting Co., 460 U.S. 1085 (1989).

On February 19, 1991, the Supreme Court in McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807 (1991), resolved a conflict among the circuits on the question of the criteria for determining seaman status under the Jones Act. In its opinion, the Supreme Court unanimously held that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Act.

On April 30, 1992, Stephenson filed a motion pursuant to Fed. R. Civ. P. 60(b), requesting that I reopen my judgment on the ground that the McDermott decision demonstrates that I erred by applying the "aid in navigation" test.

Because I do not find that Stephenson has shown the existence of the unique and

exceptional circumstances necessary to support Rule 60(b)(6) relief, I will deny his motion.

I.

A Rule 60(b) (6) motion -- the "catch-all" clause of Fed. R. Civ. P. 60(b) upon which Stephenson appears to be relying -- provides for relief from judgment "for any other reason" not mentioned in other clauses of the Rule. The motion is addressed to the sound discretion of the trial court. See, e.g., Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977). In determining whether to exercise the power to relieve a judgment under this provision, a court "must engage in the delicate balancing of 'the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be

done in light of all the facts.'" Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979) (quoting Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir. 1970), cert. denied, 399 U.S. 927 (1970) (emphasis in original)). The Supreme Court decisions which confront Rule 60(b) (6) echo these central considerations and demonstrate that relief from final judgment under this section requires a showing of "extraordinary circumstances." See, e.g., Polites v. United States, 364 U.S. 426 (1960) (denying relief from revocation of citizenship because intervening change was not substantial enough); Ackermann v. United States, 340 U.S. 193 (1950) (denying relief from revocation of citizenship despite later favorable appellate ruling in similar case because

petitioner made "deliberate choice" not to appeal); Klapprott v. United States, 335 U.S. 601 (1949) (granting relief from four year-old default judgment procured while petitioner was ill and wrongfully incarcerated).

As Stephenson urges, some courts have recognized that an intervening change in the law may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion, in order to remedy an error in the application of the law. See, e.g., Wilson v. Fenton, 684 F.2d 249, 251 (3d Cir. 1982); Fackelman v. Bell, 546 F.2d 734, 736 (5th Cir. 1977); Pierce v. Cook & Co., 518 F.2d 710, 722-23 (10th Cir. 1975), cert denied, 423 U.S. 1079 (1976); Ritter v. Smith, 811 F.2d 1398, 1401 (11th Cir. 1987), cert. denied, 483 U.S. 1010 (1987). However, the cases in which

courts found that an intervening Supreme Court decision provided the basis for granting the Rule 60(b) (6) motion involved facts which rendered such an intervening decision "unique", "exceptional", or "extraordinary."

For example, the Ritter court regarded the fact that the Supreme Court decision there at issue was decided expressly for the purpose of resolving the dispute between that case and Ritter rendered the "circumstances sufficiently extraordinary to justify disturbing the finality of the judgment." Ritter, 811 F.2d at 1402. See also Tsakonites v. Transpacific Carriers Corp., 322 F. Supp 722 (S.D.N.Y. 1970). Courts have also found extraordinary circumstances where the intervening Supreme Court decision decided a case which arose out of the same transaction as

the one on motion. In Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), the court found Rule 60(b) (6) relief appropriate because the intervening decisional change came in a case arising out of the exact same accident as that in which the plaintiffs in Pierce were injured.

This court has followed this rule in recognizing that in extraordinary situations a change in law may warrant Rule 60(b) (6) relief. See Atwell v. Equifax, Inc., 86 F.R.D. 686 (D. Md. 1980). At the same time this circuit has recognized that the need for finality means that a change in a rule of law is insufficient by itself to warrant reopening a final judgment. See, e.g., Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 229 (4th Cir. 1981) (unique

circumstances necessary to disturb final judgment); Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979) (same); Nunnery v. Barber, 23 Fed.R. Serv.2d 232 (4th Cir. 1977) (same). See also E.E.O.C. v. Baltimore & Ohio R. Co., 557 F. Supp. 1112 (D. Md. 1983) (extraordinary circumstances present where case involved 142 wrongfully terminated employees and where "justice would be served").

II

As Stephenson describes in his memoranda, until the Supreme Court decided McDermott a few months ago, the lower federal courts followed two different approaches for determining coverage under the Jones Act. Under the test established for seaman status in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), the

worker had to demonstrate that the performance of his duties contribute to the function of a vessel or to the accomplishment of its mission. The Seventh Circuit established its more stringent test in Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985), which held that seaman status for Jones Act purposes may only be conferred on employees who make "a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." Id. at 1063. This is essentially the same test which the Fourth Circuit had earlier adopted in Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976). The Supreme Court granted certiorari in McDermott expressly to resolve the

conflict between the Robison and the Johnson tests on the issue of the transportation/navigation requirement. See McDermott, 111 S.Ct. at 810.

In reaching its decision to reject the Johnson aid in navigation requirement, the Supreme Court traced the history of the Jones Act, its application, and its relation to the Longshore and Harbor Workers' Compensation Act (LHWCA). After an exhaustive analysis of its decisions, other courts' decisions, and the legislative history of the Jones Act, the Court found that the aid in navigation language picked up by the Seventh Circuit and other courts arose out of an erroneous distinction between the Jones Act and the LHWCA:

> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based

> and sea-based maritime employees. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that "seaman" had been taken to include land-based employees. There is no indication...that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation.

McDermott, 111 S.Ct. at 817. In sofinding, the Court held that the worker's particular job is not determinative, but rather "[t]he key to seaman status is employment-related connection to a vessel," id., noting that this determination in a particular case is a question for the jury which must be decided on the particular nature of the vessel and the employee's precise relation to it.

Stephenson argues that the decision in McDermott did not change the law, but rather represents a clarification of the

law, and that his motion should thus be judged by a more favorable standard. Stephenson does not cite any authority to support this proposition and, at least under the facts of this case, the distinction he draws is a matter of semantics. The elimination of the aid in navigation required can be seen either as an evolution or as a clarification of the law, depending upon one's predilections. Regardless of the label put upon it, however, Stephenson cannot be relieved under Rule 60(b) (6) unless he demonstrates that McDermott represents an extraordinary circumstance sufficient to disturb the final judgment entered against him.

Stephenson emphasizes that he is not using Rule 60(b) as a substitute for appeal. That is certainly true. He not

only appealed my ruling to the Fourth Circuit but also thereafter petitioned the Supreme Court for a writ of certiorari on the very issue now in question. That petition was denied, however. Although the Supreme Court has subsequently granted certiorari and remanded other Jones Act cases, these remands all occurred in the wake of McDermott.[1] To treat Stephenson's case differently from those cases is not at all inappropriate. It merely gives rise to the same disparity which necessarily exists whenever a question of retroactive application of a Supreme Court decision is presented. Stephenson has no more standing to complain than would, say, a criminal defendant who may have raised

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[1] Stephenson points out that his lawyer handled three of those cases. That fact, of course, is entirely irrelevant.

the issue of the improper use of peremptory jury strikes but whose case had been finally decided when the Supreme Court's decision in Batson v. Kentucky,, 476 U.S. 79 (1986) was rendered.[2] See Griffith v. Kentucky, 476 U.S. 314 (1987) (Batson applied retroactively only to cases pending on direct review or not yet final at time of Batson decision).

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[2] It might be noted that although Stephenson argues that judgment would not have been entered against him under McDermott, this is not entirely clear. Of course, the aid in navigation prong of the test would not have been applied. However, Stephenson's "precise" connection to the vessel on which he was working at the time of his injury was never fully analyzed as would be required under McDermott. Thus, matters may not be quite as cut and dried as Stephenson contends. While this fact is by no means dispositive, it does suggest the importance of applying a bright line retroactivity rule which is suspended only in genuinely extraordinary cases.

A separate order denying Stephenson's motion is being entered herewith.

Date: July 9, 1991

/s/
J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON	*	
v.	*	
MCLEAN CONTRACTING COMPANY	*	CIVIL NO. JFM-87-587
	*	

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ORDER

For the reasons stated in the memorandum entered herein, it is this 9th day of July, 1991

ORDERED that William E. Stephenson's motion for relief from judgment is denied.

/s/
J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL J. YOASH	*	
v.	*	Civil No. JFM-88-2797
MCLEAN CONTRACTING CO.	*	

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MEMORANDUM

Plaintiff, Paul J. Yoash, has sued McLean Contracting Co. ("McLean"), a maritime construction contractor, under the Jones Act, 42 U.S.C. App. § 1988, for injuries he sustained on board McLean's crane barge CAPE FEAR during construction of the Choptank River Bridge.

In July 1989 I granted a motion for summary judgment filed by McLean on the ground that the record established that Yoash was not a seaman within the meaning of the Jones Act. The Fourth Circuit ruling was upheld. Yoash v. McLean

Contracting Co., 907 F.2d 1481 (4th Cir. 1990). However, Yoash petitioned the Supreme Court for a writ of certiorari and by an order dated February 25, 1991, the Court granted certiorari, vacated the judgment and remanded the case to the Fourth Circuit for further consideration in light of the decision in McDermott Int'l. Inc. v. Wilander, 111 S. Ct. 807 (1991). Yoash v. McLean Contracting Co., 111 S. Ct. 1068 (1991). The Fourth Circuit has in turn remanded the case to me.

I.

McLean has again moved for summary judgment on the ground that Yoash is not a seaman. McLean's motion will be denied.

In granting McLean's prior summary judgment motion, I ruled that Yoash was not a seaman as a matter of law because

his duties on board the CAPE FEAR did not contribute to the "transportation function" of the barge. In McDermott the Supreme Court rejected the test which I applied. The Court held that "it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel" and that "the key to seaman status is employment-related connection to a vessel in navigation." McDermott, 111 S. Ct. at 817.

McLean's present argument is based upon the Supreme Court's favorable citation in McDermott of a law review article by Professor David W. Robertson. Id. (citing David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985)). The Court cited this article in support of the statement that "[a]ll who work at sea in the service of a

ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." McDermott, 111 S. Ct. at 817. In his article Professor Robertson proposed a new formulation for determining seaman status. Under that formulation a worker would qualify as a seaman "(1) when a substantial part of his duties are performed on vessels, and (2) his work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable waters." Robertson, supra, at 120.

McLean urges that applying that test here Yoash is not a seaman because he was not exposed "to the perils of the sea." Frankly, I would like to accept this argument. I am of the view that if the

Court's decision in McDermott was intended to extend Jones Act remedies to persons such as Yoash, who essentially are construction workers, exposed to no greater hazards than are their counterparts working on the adjacent land, the decision was misguided. There simply is no sound policy reason why such workers should, instead of receiving worker's compensation benefits, be afforded liberal maritime remedies traditionally designed to protect "blue-water" seaman exposed to the perils of the sea. However, I am not persuaded that the Court's citation of Professor Robertson's article in support of a rather general statement signal an intention to adopt his proposed formulation. Rather, I am forced to conclude that the Court merely adopted a two-part test requiring that the vessel in

question be one in navigation and that the worker's employment be connected to that vessel's work. E.g., McDermott, 111 S. Ct. at 817.

II.

McLean's second contention is that the CAPE FEAR was not a "vessel in navigation." I have wavered on this issue before. Compare Presley v. Healy Tibbits Constr. Co., 646 F. Supp. 203, 206 (D. Md. 1986) (finding that a crane barge is not a vessel in navigation) with Stephenson v. McLean Contracting Co., 702 F. Supp. 552, 554 (D. Md. 1988) (questioning the validity of the Presley holding).

A.

The relevant facts are as follows. The CAPE FEAR carries a "whirly crane," a large revolving crane designed especially for maritime construction. The barge is

equipped with spuds, steel legs which are lowered to the riverbed to keep the barge stationary during work. It has no conventional power of self-propulsion but by means of deck winches can move along its anchor lines. The barge can also move by using the crane to "cast" the buoys from which the anchor lines are suspended. Generally, however, the CAPE FEAR must be towed in order to move distances greater than the length of the anchor lines.

The CAPE FEAR's primary function at the Choptank site was driving piles. It was also used to place concrete caps on completed bridge columns. When the barge was setting caps, unlike pile driving, the spuds were not lowered due to the listing that resulted from the weight of the caps. To coordinate pile driving with cap-setting work, the CAPE FEAR had to move

back and forth across the Choptank, a distance averaging about one mile. Depending on the work to be done, the barge might move as often as three times in one day or might remain stationary for several days. When moving, the CAPE FEAR usually stayed within a half-mile of the column line of the bridge. Only once during Yoash's employment did the CAPE FEAR leave the Choptank jobsite. The barge was moved to an anchorage in Trappe Creek, approximately 10-12 miles distant, to take shelter from an approaching hurricane.

On October 15, 1985, Yoash sustained the injuries for which he sues while the crew of the CAPE FEAR was preparing to move the barge. At the time of the accident, he was walking across the deck to reach a winch. Apparently, an anchor

line had been improperly placed over a spud line. Yoash was stepping over the anchor line at the precise moment the crane was lifting the spud line in order to move the barge. The anchor line, suddenly jerked upward by the rapid movement of the spud line, caught Yoash and threw him against machinery on the deck, injuring his leg.

B.

Against this background I conclude, as other district courts have done, see, Reecer v. McKinnon Brige Co., 745 F. Supp. 485, 491 (M.D. Tenn. 1990); Coats v. Luedtke Eng. Co., 744 F. Supp. 884, 889 (E.D. Wis. 1990), that a jury question is presented as to whether a crane barge like the CAPE FEAR was a "vessel in navigation." Again, I reach this conclusion reluctantly. As I stated

earlier in Presley, 646 F. Supp. at 206 n. 1, "to the extent possible questions of 'status' should be resolved by bright-line tests and not on an ad hoc factual basis." However, in McDermott, 111 S. Ct. at 818, the Supreme Court noted that seaman status under the Jones Act is a mixed question of law and fact reserved for the jury and that the court's role is "to determine if there is a reasonable basis to support the jury's conclusion." See Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1072-73 (5th Cir. 1986) (seaman status not solely a question of law when trial judge cannot state an unvarying rule of law that fits the facts) (quoting Offshore Co. v. Robison, 266 F.2d 769, 779-80 (5th Cir. 1959)). Relevant factors for the jury to consider are the CAPE FEAR's capacity for movement, see Brunet

v. Boh Bros. Constr. Co., 715 F.2d 196, 198 (5th Cir. 1983), the extent to which it was actually used as a means of transportation, see Daniel v. Ergon, Inc., 892 F.2d 403, 408 (5th Cir. 1990), the frequency of movement, see Ellender v. Kiva Constr. & Eng., Inc., 909 F. 2d 803, 808 (5th Cir. 1990); Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 293 (5th Cir. 1990) and the use to which the vessel was being put at the time of the accident, see Ellender, 909 F.2d at 806; Bernard v. Binnings Constr. Co., 741 F. 2d 824, 829 (5th Cir. 1984).

A separate order denying McLean's motion is being entered herewith.

/s/
J. Frederick Motz
United States
District Judge

Date: November 14, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL J. YOASH	*	
v.	*	Civil No. JFM-88-2797
MCLEAN CONTRACTING CO.	*	

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ORDER

For the reasons stated in the memorandum entered herein, it is this 14th day of November 1991

ORDERED that McLean Contracting company's Motion for summary judgment is denied.

/s/
J. Frederick Motz
United States District Judge